No. 12,367

IN THE

United States Court of Appeals

For the Ninth Circuit

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, NICK KABAK, a partnership doing business under the firm name and style of North Star Mining Company,

Appellants,

vs.

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, Deceased,

Appellee.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

I.

JURISDICTION OF DISTRICT AND APPELLATE COURTS.

This action was commenced by appellants in the District Court for the Territory of Alaska, Fourth Judicial Division. On the 20th day of October, 1947, appellants, lessees of a certain mining claim located within the said Fourth Judicial Division, filed a Second Amended Complaint (T.R. 2) whereby they sought to recover damages from their deceased les-

sor's estate for certain alleged conduct on the part of the said lessor. Issues were joined on Appellants' Reply (T.R. 19) to Appellee's Amended Answer (T. R. 15) to said Second Amended Complaint.

A jury trial was had on the issues so joined and, at the close of appellants' evidence, a verdict for appellee was directed by the trial Court. (T.R. 275.) Judgment for appellee and against appellants was entered accordingly on the 12th day of January, 1949. Notice of Appeal was filed on the 6th day of April, 1949. On the 9th day of April, 1949, the said District Court allowed the Appeal (T.R. 26) but subsequently set aside said Appeal on the 6th day of May, 1949. Upon mandate of this Court (T.R. 31) the said District Court reinstated the Appeal (T.R. 34) on the 12th day of September, 1949, and said Appeal was duly perfected and lodged in this Court within the time allowed by law.

The right of Appeal from the said District Court to this Court is provided for by 28 U.S.C. Sec. 1291.

II.

STATEMENT OF CASE.

Appellants, as lessees of a placer mining claim, filed a complaint in the District Court whereby they sought to recover damages from the estate of their deceased lessor. The basic matters alleged in that complaint were: (1) the capacity of the appellees; (2) the demise of the lessor and the appointment of

the executrix, now appellee; (3) the execution of the lease and its incorporation in the complaint; (4) an entry by appellants upon the leasehold and a compliance with the terms of the lease; (5) a wrongful attachment by the lessor with instructions to the U.S. Marshal, pursuant thereto, to oust and eject the appellants and a resultant ouster and ejectment, with a custodian placed in charge of the demised premises preventing re-entry; (6) a voluntary nonsuit by decedent lessor after the arrival of winter had made a resumption of mining operations impossible; (7) as damages, the appropriation by decedent of $20,000 worth of gold contained in a dump and sluice boxes; expenditures in the amount of $6,791.29 and expected profits for the duration of the lease of $100,000; (8) a prayer for damage in the amount of $106,791.29.

In her answer, appellee, in legal effect, admitted the capacity to sue of Nick Kupoff and James Zukoev but denied an assignment making the remainder of appellants parties in interest; admitted the death of the lessor and the appointment of appellee as executrix; admitted the execution of the lease; denied entry and compliance with the terms of the lease; denied the wrongful attachment and the ouster and ejectment pursuant thereto; admitted the entry of a nonsuit by the lessor but denied the impossibility of resuming mining operations; denied all of the allegations with respect to damages. For an affirmative defense, the appellee pleaded the tolling of the Statute of Limitations and a failure to file a claim with the estate of the decedent as required by law.

These affirmative matters were traversed by appellants' reply.

The issues having thus been joined, appellants introduced their evidence, at the close of which, appellee moved for a directed verdict (T.R. 249-257) based on the following grounds: (1) That the action was *ex delicto* in which case the Statute of Limitations had run; (2) That there was no evidence of damages; (3) That a voluntary nonsuit would not, in itself, make an attachment wrongful; (4) That no claim was filed with the decedent's estate for this particular cause of action; (5) and that there was a failure of evidence of ejectment. The trial judge sustained the motion upon the following grounds (T. R. 272-274): (1) That the action was in tort and that, the Statute of Limitations had therefore run; (2) that no claim *of the nature* on which this action had been based, was filed with the decedent's estate; (3) that there was no evidence of ejectment; (4) that, since the attachment as shown by the evidence was only of personal property, there could not have been an ejectment; (5) that there was no showing of authority that Stepovich ever directed the Marshal to eject anyone; (6) and that there was a failure of evidence as to damages.

Appellants moved for a new trial (T.R. 21) saving as questions for review the correctness of the trial Court's action in sustaining appellee's motion for a directed verdict and the propriety of evidentiary rulings made by the trial Court. These matters were assigned as error in this Court. (T.R. 279-281.)

III.

STATEMENT AS TO ARRANGEMENT OF BRIEF.

The particular errors made in evidentiary rulings will be considered in the body of this brief, where relevant, in the treatment of the trial Court's ruling on appellee's motion for a directed verdict. These rulings are so closely connected and interwoven with the matters considered on the motion as to destroy whatever continuity this brief may possess by treating them separately. For the purposes of systematic arrangement, the various bases of the trial Court's ruling on appellee's motion will be treated in the same order as made by the trial Court. For convenience and to avoid repetition, rules operating as guideposts for appellate treatment of an appeal from a directed verdict will be discussed first.

IV.

APPELLATE TREATMENT OF APPEAL FROM DIRECTED VERDICT.

The rule adhered to by this Court in reviewing the evidence on orders denying or granting a motion for a directed verdict is set out in *Indemnity Insurance Co. of North America v. Atchison, T. & S. F. Ry. Co.,* 85 F. (2d) 438, 439, following the rule as expressed in *Lumbra v. United States,* 290 U.S. 551, 553, 54 S. Ct. 272, 78 L. Ed. 493:

> " 'The question presented is whether there is any evidence upon which a verdict for petitioner might properly be found. And for its decision,

> we assume as established all the facts that the evidence supporting petitioner's claim reasonably tend to prove, and that there should be drawn in his favor all the inferences fairly deducible from such facts. Gunning v. Cooley, 281 U.S. 90, 94, 50 S. Ct. 231.' "

Accord:

Ojus Mining Co. v. Manufacturer's Trust Co., 82 F. (2d) 174.

Before the decision of the Supreme Court in the *Lumbra* case, supra, the rule of this Court was expressed in terms of assuming the truth of all evidence sustaining plaintiff's right to recover, including inferences of fact deducible therefrom. *Summers v. Denver Tramway Corporation,* 43 F. (2d) 286. The present rule is, perhaps, broader, in that it treats as true all facts which the evidence tends to prove and the inferences fairly deducible from those facts.

An additional consideration important in appellate treatment of appeals from directed verdicts is that the Court will assume that a case was made for the jury on an issue, the insufficiency of evidence on which was not assigned by the trial Court in support of its ruling. *Pope v. Utah Idaho Cent. R. Co.,* 54 F. (2d) 575.

V.

TORT OR CONTRACT.

The first ground stated by the trial Court for its direction of a verdict was that appellants' complaint

stated a cause of action in tort and not contract and that the period for bringing a tort action had expired at the time this action was commenced. As far as we can ascertain from argument of appellee's counsel in support of the motion (T.R. 249-257) the tort action thought to have been alleged was for a wrongful attachment, although counsel may have been arguing that it was for a tortious eviction or for both. Indeed, counsel's supporting argument, though showing an admirable familiarity with conventional tort phraseology, stops well short of any deep-rooted analysis of matters alleged in appellants' complaint. Nor does the trial judge clarify the issue by advancing any reasons in support of his finding that the action was based on tort. (T.R. 272.)

Any considered analysis of appellants' complaint, it is submitted, will reveal that it states a cause of action in contract as distinguished from an action in tort—an action brought for breach of a lease rather than for tortious eviction or wrongful attachment. Before commencing our construction of the complaint, it would be well to review briefly the authorities which we deem pertinent.

It is a fundamental principle of law that where the same conduct constitutes a tort and also a breach of contract, the party aggrieved by that conduct may make an election of which of the remedies he wishes to pursue. *Jones v. Kelly,* 208 Cal. 251, 280 P. 942; *Matthys v. Donelson,* 179 Iowa 111, 160 N.W. 944. Although, strictly speaking, there can be no election where one of the remedies is unenforceable, still, this

has been the language employed by the Courts. *Matthys v. Donelson,* supra. The problem then resolves itself into a determination of which remedy complainant, in fact, has pursued in a given case.

To arrive at a judicial determination of this matter in doubtful cases, the Appellate Courts have laid down certain presumptions and rules, most of which have been designed to sustain the jurisdiction of the Court and to afford the pleader relief. Jurisdiction is here used in the sense of the power of the Court to grant relief rather than in the sense of its power to take cognizance of the subject matter of the action or to obtain control over the parties to the controversy.

To illustrate, it is stated as a general rule that where it is doubtful whether a pleading states a cause of action in tort or in contract, it will ordinarily be construed as the latter. *Nathan v. Locke,* 108 Cal. App. 158, 287 P. 550; affd. *per curiam,* 108 Cal. App. 158, 291 P. 286; *Douglas v. Loftus,* 85 Kan. 720, 119 P. 74. This rule has been given the status of a presumption in *Southern Pacific R. Co. v. Gonzales,* 48 Ariz. 260, 61 P. (2d) 377, citing *Anderson v. Thude,* 42 Ariz. 271, 25 P. (2d) 272, 273:

> "It is the rule that if the complaint may be construed either as one in tort or one on contract, that it will be presumed to be the latter."

The rule is stated in still another way in *Timmons v. Williams Wood Products Corp.,* 164 S.C. 361, 162 S.E. 329, 332:

> "* * * The generally accepted rule is that, in doubtful cases, every intendment is in favor of regarding the action as ex contractu."

In *Nathan v. Locke,* supra, the rule is stated to be based on the factor that liability in contract is less extensive than in tort. An examination of the fact-situation in that case clearly reveals that the rule was employed merely as a device to reach a desired result—the granting of relief to the pleader. The action in that case was brought by a judgment-debtor to recover contribution from his co-defendants. Under California law, the remedy of contribution would only be available if the action on which the judgment was based were *ex contractu.* The Appellate Court held the plaintiff entitled to contribution. For this result, the Court applied the above-stated rule as a reason for its holding, even though the basis of that rule could have no application to the fact-situation then confronting the Court.

In *Matthys v. Donelson,* supra, the Iowa Court, adhering to a rule antithetical to that employed by the California Court in *Nathan v. Locke,* reached the same result as the California Court where an application of the Iowa rule under the circumstances would have denied relief to the pleader. Said the Iowa Court, p. 945:

> "The situation is such in many cases that an action as of tort or an action as for breach of contract may be brought by the same party upon the same state of facts. Cooley on Torts (3d Ed.) 56. Thus actions for the same loss may be main-

tained against a common carrier of goods or messages ex contractu or ex delicto, and save where the bar of the statute of limitations is involved, if there be doubt, the cause of action is usually construed as sounding in tort. But where one would be barred by the statute of limitations and the other would not, the latter will be presumed to have been intended, for it is not likely anyone would choose to prosecute an action ex delicto which would be barred when the same relief was available in an action ex contractu."

The case of *Southern Pacific R. Co. of Mexico v. Gonzales,* supra, serves further to illustrate the extent to which a Court will go to afford relief to the pleader. In that case, the question involved was whether or not plaintiff had stated a cause of action for breach of the defendant carrier's common law duty to afford safe carriage for goods or a breach of its contractual duty to afford the same. If the former were true, the statute of limitations would operate as a bar to relief; if the latter, plaintiff was entitled to relief. That portion of the opinion pertinent to this inquiry appears at pages 386 and 387 of the Pacific Reporter. After stating, p. 387, that paragraph 5 of plaintiff's complaint had carefully set out an agreement upon consideration obligating the defendant carrier to safely transport the plaintiff's goods, the Court noted that paragraph 7 of the complaint consisted of allegations of affirmative and negative non-feasance, "two things which are ordinarily presumed to give rise to an action ex delicto".

Paragraph 7 as set out by the Court does not correlate the tortious allegations with the contract as alleged in paragraph 5. Yet the Court found that plaintiff had stated a cause of action for breach of an *implied contract* to safely carry the plaintiff's goods. To arrive at this result, the Court examined the *only contract introduced in evidence,* the bill of lading, after noting that plaintiff did not "see fit to set forth all or part of the contract on which he claims to rely *haec-verba*". After observing its adherence to the rule that if an action is on the contract, allegations of its breach through negligence of the defendant will not transform it into a cause of action in tort, the Court made the necessary connection between the tortious allegations in paragraph 7 and the contract alleged in paragraph 5 by comparing those allegations with the conditions of non-responsibility appearing in the Bill of Lading, it being the opinion of the Court that plaintiff's pleading recognized the necessity of negativing non-responsibility.

The introductory language employed by the Court in approaching this problem is also illuminating, p. 387:

> "Let us then examine the complaint to determine whether it appears clearly that it is ex delicto, or whether the question is doubtful."

This language and the reasoning of the Court clearly indicates that every intendment will be resolved in favor of the pleader and in construction of the pleading as stating a cause of action in contract where a tort action arising out of the same basic fact-situa-

tion would be barred by the statute of limitations. Accord: *Matthys v. Donelson,* supra.

The case also stands for certain other propositions important to the decision of the matter now confronting this Court. It is authority for the rule that where a complaint states a cause of action in contract, the fact that it alleges that the breach occurred through tortious conduct on the part of the defendant will not transform the contract action into one in tort. Accord: *Timmons v. Williams Wood Products Corp.* supra; *Ketcham v. Miller,* 104 Ohio St. 372, 163 N.E. 145. It stands for the further proposition that in cases of doubt, the averment of a promise or consideration or usual incident of contract, are significant considerations in giving character to an action as *ex contractu.* Accord: *Timmons v. Williams Wood Products Corp.,* supra.

There is, however, one significant aspect to the *Gonzales* case, supra, which requires particular emphasis—that being the procedure employed by the Arizona Court of inquiring into the evidence produced at the trial of the case where an examination of the complaint did not remove, from the Court's mind, doubt as to the nature of the action set out in the complaint. Although as a general rule, the nature of the action must be determined solely from the pleadings (1 *C.J.S. Actions,* Sec. 46, p. 1100), still it is submitted that the approach of the Arizona Court where the matter still remained in doubt after an examination of the pleadings, is a wise and judicious procedure. It is not the policy of the law today

to penalize the litigant because of inept pleading on the part of his counsel. The Federal Rules of Civil Procedure exemplify the trend of American Jurisprudence today—a trend away from the pitfalls of technical pleading and strict procedure. A rule which allows the pleader to present his evidence on the theory that he has stated a cause of action in contract and does not permit one to resort to that evidence to clarify the issue where the pleadings leave the matter in doubt is not a rule designed to obtain justice in a given case, but is a rule without foundation in law or reason, the application of which can only work injustice.

There are still other guideposts to a judicial determination of the nature of a cause of action in addition to those heretofore set out. The judicial approach has been in terms of ascertaining the "gravamen" of the action.

Gravamen is defined by *Black's Law Dictionary* (3rd Ed. 1933), p. 856, as follows:

> "Gravamen—the burden or gist of a charge; the grievance or injury specially complained of."

And this is the sense in which that term has been employed by the Courts. *Nathan v. Locke,* supra; *Ketcham v. Miller,* supra. Thus in *Nathan v. Locke,* the California Court, noting that the whole theory of plaintiff's complaint for eviction was based on anticipated profits which he would have recovered had he been allowed to remain in peaceable and undisturbed possession, held that plaintiff had stated

a cause of action for an eviction *ex contractu* rather than *ex delicto*. *Ketcham v. Miller* is to the same effect.

Ketcham v. Miller, supra, is also significant in that it clarifies the effect of employing tortious phraseology in a complaint that states an action in contract. At p. 146 of the opinion, the Court says:

> "The amended petition alleges title of the property to be in the plaintiff in error; alleges the authorization of the attorney-in-fact to execute a lease; alleges the execution of the lease to defendants in error; sets out the lease and makes it a part of the petition; alleges the value of the lease to the defendants in error; alleges the breach by the plaintiff in error in an unlawful, forcible, wilful, wanton and malicious manner, and denominates it a breach; alleges that plaintiff in error 'has ever since held and now does so unlawfully, wilfully, wantonly and maliciously keep and hold said premises, and will continue to do so; and has prevented and does now and will prevent plaintiffs from using and enjoying the same, and from making and acquiring the profits and value of said lease, and from obtaining the said extension thereof, as plaintiffs desire to do, to the damage of these plaintiffs in the sum of $150,000.00.'
>
> "What is the gravamen of this complaint? Of what are the defendants in error complaining? They do not complain of damage to or destruction of the building, the subject matter of the lease, their property for the term; they do not claim of any injury to their effects; but they do aver that the value of the lease to them is $150,-

000.00, that they have been unlawfully, forcibly, wilfully, wantonly, maliciously, and without their consent deprived of the benefits thereof, and ask judgment for damages in that sum.

"It is true that the petition characterizes the breach as having been committed * * * 'unlawfully, forcibly, wrongly, wantonly, maliciously, and without consent' of the defendants in error. What do these words add to the averment of a breach? Generally speaking, breaches are unlawful and ejectments are forcible; most breaches are wilful and perhaps but few are 'wanton' and 'malicious'; but do the words 'wanton' and 'malicious' transform an exact averment of a breach of contract into an averment of the commission of a tort; or do they not, in the connection here used, charge the plaintiff in error with the commission of a breach, and attempt to emphasize it by averring that it was done in utter disregard of the rights of the defendant in error and an evil and wicked purpose?

"While the facts in this case might well have justified a pleading charging a tort, we are unable from the amended petition itself to reach any other conclusion than that the gravamen of the complaint is the breach of the contract, and that the words 'wilfully, wantonly and maliciously' add nothing thereto and must have been intended by the pleader to characterize the motive and purpose of the perpetrator of the breach * * *."

The gravamen of the complaint, as indicated by the above language, is to be determined by the nature of the grievance rather than the form of the plead-

ings (Accord: *Nathan v. Locke,* supra), and the nature of the grievance is to be determined by a consideration of the pleading construed as a whole. (Accord: *Douglas v. Loftus,* supra.)

In light of the foregoing authorities we now proceed to examine appellants' complaint in the instant case.

The lease itself is attached to and incorporated in the complaint (T.R. 3, paragraph III of Appellants' Second Amended Complaint), a pleading practice hardly consonant with the theory advanced by the trial Court that the action was in tort. *Furthermore, there are allegations of entry under and compliance with the terms of the lease*—allegations necessary to recovery in contract but not in tort—which clearly indicate that it is a breach of the lease for which recovery is sought. (T.R. 3, 4, paragraph IV of Appellants' Second Amended Complaint.)

Then, it is alleged, that "notwithstanding the fact that all accounts had been fully settled" between the appellants and the decedent lessor, that decedent did "wrongfully and unlawfully" cause a writ of attachment to be issued by the District Court commanding the United States Marshal to attach certain property on the leased ground; and did "unlawfully, wrongfully and maliciously, abuse the process of this Court by directing and instructing the United States Marshal to seize all of the said property of plaintiffs and oust and eject the said plaintiffs from the said demised premises". (T.R. 4, 5, paragraph V of Appellants' Second Amended Complaint.) It is submitted

that these allegations are not inconsistent with an action in contract when *the complaint is considered in its entirety and undue emphasis is not placed on the language employed or on this particular paragraph of the complaint isolated from its context. The tortious phraseology employed serves only to characterize the conduct of decedent and to lay a foundation of intent to dispossess contrary to the terms of the lease.* Thus, was the allegation included that these acts were done "notwithstanding the fact that all accounts had been fully settled". Furthermore, appellants will attempt to demonstrate in a later portion of this brief that, even assuming the "legal validity" of the attachment, the circumstances surrounding its procurance and levy may make it a breach of the contract existing between the parties. It is in this latter context that conduct may be tagged with tort labels and make sense though not employed to state, nor stating a cause of action in tort. Thus, where an action in contract alleges matters sounding in tort, these matters are treated as surplusage and do not alter the essential nature of the action.

Appellants then proceed to set out their ouster and ejectment pursuant to the writ and the instructions of the decedent and the placing of a custodian in charge of the premises and a prevention of re-entry and a continuance of work under the lease. (T.R. 5, paragraph VI of Appellants' Second Amended Complaint.) Next, appellants allege the entry of a voluntary nonsuit by decedent on the 24th day of November, 1942, after winter had set in making a resump-

tion of mining operations impossible. (T.R. 5, paragraph VII of Appellants' Second Amended Complaint.) These allegations make it clear that the gist or gravamen of appellants' complaint was grounded on the lease and the conduct of decedent in preventing the enjoyment of the leasehold for the balance of its term; that is, that the eviction was a violation of the implied covenant of quiet enjoyment. The allegations of damages and the prayer for relief further substantiate this construction of appellants' complaint. Appellants seek to recover as damages their share of the profits "under the terms of said lease" which they would have recovered during the remainder of their term had they not been ousted by decedent. Further, the acts and doings of decedent, with their tort tags, were done with "the intent of ousting and ejecting the plaintiffs from said mining ground and preventing them from mining under said lease, and to damage plaintiffs thereby". (T.R. 5, 6 and 7, paragraphs VIII, IX and X of Appellants' Second Amended Complaint.) Surely, if we were able to forget for a moment our legal education and apply common sense to the facts as pleaded, we could quickly ascertain of what appellants were complaining. They were complaining, purely and simply, that they had entered into a lease with the decedent according to which they were to be allowed to mine the ground for a certain period of time; and that the decedent, in violation of this lease, had caused their property to be attached by the Marshal, a guard to be placed in charge of the claim, and has caused them to be excluded from the claim preventing them from min-

ing it for the balance of the term even though they had in no way been in fault. This was the gist, the gravamen, the true cause of their complaint, which is easily discernible when the legal verbiage has been weeded out and the clear vision of reason employed to read the complaint.

In conclusion, it is to be noted that appellants' prayer for relief is limited to compensatory damages. Had counsel wished to state a cause of action in tort, surely he would have asked for punitive damages in view of the nature of the conduct alleged to have been indulged in by the decedent.

Furthermore, an examination of what appellants proved and sought to prove as considered in subsequent sections of this brief dealing with the question of eviction and damages will clearly indicate that counsel thought that he had stated a cause of action in contract and was seeking to prove the same. See *Gonzales* case, supra.

VI.

FAILURE TO FILE CLAIM WITH ESTATE OF DECEDENT.

The second reason advanced by the trial Court to sustain appellee's motion for a directed verdict was that appellee had failed to file the claim sued on with the estate of the decedent as required by law. If this Court sustains appellants' view that appellants proceeded in contract and not tort, then this reason is obviated as a claim for breach of the lease was filed

with the estate and admitted in evidence at the trial of this case. (T.R. 112.)

It is significant to note that the measure of relief asked for by the appellants in their claim filed with the estate is identical in amount with that requested by their prayer in the instant case—indicative of appellants' belief that they were pursuing a contractual remedy.

VII.

FAILURE OF EVIDENCE OF EVICTION.

The third reason advanced by the trial Court to sustain appellee's motion was failure of evidence of ejectment. The trial judge apparently entertained the theory that there could be no ejectment where the Marshal had been directed by the decedent to attach only the personal property of the appellants and that there was no showing that the deceased had ever directed the Marshal to eject the appellants. (T.R. 272, 273.) The fallacy of the trial judge's conclusions, it is submitted, lay in his failure to consider or realize what evidence of eviction would be sufficient to make out a *prima facie* case where the gravamen of the action was for breach of the lease and not for tort. Having decided that the action was in tort, it was unnecessary for the trial judge to determine the sufficiency of the evidence to establish a commission of that tort; and, having proceeded, apparently, to do just that, his reasoning can be of little assistance in a solution of the problem at hand.

A.

Introductory statement.

It is submitted that the evidence presented by appellants at the trial of this case made out a *prima facie* case of constructive, if not actual eviction, which entitled appellants to damages as a breach of the implied covenant of quiet possession in the absence of countervailing evidence by the appellee. However, if it is determined by this Court that the record is insufficient in that respect, then it is contended that erroneous rulings of the trial Court on evidentiary matters were prejudicial to appellants in that they were prevented from making out a *prima facie* case.

We will proceed, first, by summarizing that evidence of appellants on this point which managed to sift through the constant barrage of objections interposed by appellee's counsel—said objections adding little to the judicial function of fact-finding and considerably enhancing the cost of printing the transcript. We will then discuss the substantive aspects of constructive eviction and their applicability to the facts as established. Finally, we will discuss those evidentiary rulings which are deemed prejudicial to the appellants' development of a case of actual or constructive eviction.

B.

Case made out by admitted evidence.

On the 13th day of February, 1942, a mining lease was executed by and between the decedent, Mike Stepovich, as lessor, and one Paul Drazenovich, ap-

pellant James Zukoev and appellant Nick Kupoff, as lessees, the term of said lease to expire on the 1st day of November, 1943. The consideration for this lease running to the lessor was one-third of the amount of precious minerals recovered from each cleanup. (Original lease admitted in evidence as plaintiff's Exhibit "A". (T.R. 38.) The lease is set out in full on pp. 8 to 14 of the T.R.) On the 6th day of August, 1942, Drazenovich sold his interest in the lease to the appellants herein. (Exhibit "E", T.R. 95 to 97.)

The appellants Kupoff, Zukoev and Drazenovich entered into possession of their leasehold interest on the 18th day of February, 1942. (T.R. 39.) After spending four to five weeks removing ice from a shaft and an old drift (tunnel), the appellants commenced exploratory drifting in an effort to locate the pay streak. After commencement of this exploratory work, the lessor visited the mine site "sometimes every day, sometimes every other day". On these occasions he would obtain and pan dirt from the new drift. (T.R. 41 to 44.) "Around the first part of August", a rich pay streak was located by the appellants. (T.R. 48.)

On the 21st day of August, 1942, the lessor commenced an action in the District Court against the lessees and a writ of attachment was issued by the clerk of that Court on the same day, commanding the United States Marshal to attach and safely keep all of defendants' property not exempt from execution and sufficient to satisfy the debt sued on and costs

and disbursements. (Plaintiff's Exhibit "D", certified copy of writ of attachment, T.R. 79.) The writ recites that the necessary affidavit and undertaking as required by law had been filed.

The complaint in said action sets out five separate causes. The first is for rental due on a certain RD 7 caterpillar from the 20th day of February, 1942 to the 15th day of April, 1942, in the amount of $2,-700.00. The last four causes are based on assignments to the lessor of debts due and owing from the appellants to third parties, each of these debts having been assigned to the lessor on the 20th day of August, 1942. A summons was issued on this complaint on the 21st day of August, 1942, and returned served on the appellants Kupoff and Zukoev on the 24th day of August, 1942. (Plaintiff's Exhibit "C", certified copies of the complaint, summons and Marshal's return. (T.R. 62 to 71).)

Plaintiff's Exhibit "B" (T.R. 52), which is a statement of the account between the lessor and the appellants as of August 8, 1942, is acknowledged paid in full by the lessor. One of the items mentioned therein is "Caterpillar rent under lease—July payment—$250.00". It appears from the evidence that this was the only caterpillar tractor concerning which the parties had any agreement or chattel lease. (T.R. 100-101.)

Plaintiff's Exhibit "I", (1), (2), (3) and (4) (T. R. 192-195) (Public Notices of Attachment), show that the following property was attached on the 21st

day of August, 1942, pursuant to the writ of attachment (Plaintiff's Exhibit "D", supra) issued by the clerk of the District Court: Cord wood and timbers; gasoline, fuel oil and grease; merchandise and groceries; dump and contents of sluice boxes. The notice of attachment of the woodpile was posted on the woodpile; that attaching the gasoline, fuel oil and grease on the outside of the boiler house door; that attaching the merchandise and groceries on the outside of the messhall door; and that attaching the dump and the contents of the dump on a jim pole at the head of the sluice box.

Upon the service of the summons and complaint and the posting of the notices of attachment, appellants immediately ceased work and left the mine. (T.R. 84.)

A watchman, named Rylander, took possession of the property. (T.R. 142, 145.)

Plaintiff's Exhibit "G" (T.R. 167), the U. S. Marshal's docket sheet contains the following pertinent entries: That Pat O'Connor, Deputy, levied upon and took into possession per return personal property at Fish Creek, and appointed Emil S. Rylander custodian on the 22nd day of August, 1942; that on September 15, 1942, E. I. Tonseth, deputy, received authorization from plaintiff (the lessor Mike Stepovich) to release the custodian on September 14, 1942, and that the custodian was accordingly released; that the summons was served on the appellant James Zukoev and the appellant Nick Kupoff at Fairbanks

on the 24th day of August, 1942. The letter from the lessor authorizing the Marshal to dispose of the services of the custodian was admitted in evidence as Exhibit "H". (T.R. 174.)

It is admitted by the appellee in the pleadings that the case instituted by the lessor against the appellants was voluntarily nonsuited on the 24th day of November, 1942. (Paragraph VII of Plaintiff's Amended Complaint (T.R. 5) admitted by Paragraph VII of Defendants' Answer (T.R. 16).)

It was further testified to that, at the time when said voluntary nonsuit was entered, a return to mining under said lease would not be feasible or possible as the temperature was 42° to 45° below zero and that it would take a few months to clean the drift and shaft of ice and to re-timber the drift when it became possible to commence operations again. (T.R. 147-151.)

C.

Substantive aspects of constructive eviction.

An eviction is a breach of the covenant of quiet enjoyment which covenant is implied in every lease in the absence of an express covenant to the contrary or inconsistent with that implication. See *Wallace v. Carter,* 133 Kan. 303, 299 P. 966; *Sandall et al. v. Haskins,* 104 Utah 50, 137 P. (2d) 819; *Best v. Crown Drug Co.,* 154 F. (2d) 736; *Boyle v. Bay,* 81 Colo. 125, 254 P. 156 and annotation on subject appearing at 62 A.L.R. 1257. In the instant case, the lease forming the subject matter of this action, containing

nothing inconsistent with that implication, a covenant of quiet enjoyment must be implied.

The existence of this covenant having been established, the question then resolves itself into a determination of what acts or conduct on the part of the lessor are sufficient to constitute an "eviction" which will operate as a breach of that covenant.

The general rule as to what constitutes an eviction is laid down by the Colorado Court in the case of *Isabella Gold Mining Co. v. Glenn,* 37 Colo. 165, 86 P. 349, at p. 350:

> "There is a marked distinction between a trespass and eviction. A mere trespass does not amount to an eviction, though it may be accompanied by such acts, and committed in such circumstances, as to be equivalent thereto. An eviction may be actual or constructive; *and any* act of the lessor by which his tenant is deprived of *the enjoyment* of the whole or a material part, of the demised premises, or which shows an intent upon the part of the lessor, permanently to *deprive, or seriously to obstruct or interfere with,* the tenant's quiet and peaceable enjoyment thereof amounts in law to an eviction. *Hyman v. Jockey Club Co.,* 9 Colo. App. 299, 305, 48 P. 671; *McAdams: Landlord and Tenant* (3rd Ed.) Sec. 403." (Italics ours.)

The intent to deprive the lessee of his enjoyment of the leased premises need not be actual but may be inferred, nor need there be any physical ouster or ejectment. If the lessee yields to the acts of the lessor and abandons possession and if the natural and prob-

able consequences of the lessor's acts, inferred from their character, are such as to deprive the lessee of the use and enjoyment of the premises, a "constructive" eviction has taken place. *Westland Housing Corp. v. Scott,* 312 Mass. 375, 44 N.E. (2d) 959.

Nor does the fact that the "eviction" is achieved through legal process, as in the instant case, alter its character. *Hubble v. Cole,* 88 Va. 236, 13 S.E. 441.

Thus, in *Maggio v. Price, et ux.* ..... La. ..... 1 So. (2d) 404, it was held that a sheriff's act in closing up leased restaurant premises and retaining keys, with the landlord's knowledge and acquiescence, in execution of a writ of provisional seizure, sued out by the landlord to protect his claim for rent, had the effect of evicting his tenants from the premises, so as to entitle them to cancellation of the lease as of the date of such eviction, though they made no demand on landlord for keys or possession of premises.

Although the Louisiana court applies the Civil Law, their code, Article 2692, obtains the same result as the Common Law implied covenant of quiet enjoyment, it being provided that it is the duty of the lessor to maintain the lessee in peaceable possession of the leased property. *Henry Rose Mercantile & Mfg. Co. v. Stearns,* 154 La. 946, 98 So. 429.

In considering whether or not there has been an eviction, the purpose for which the premises were leased must be considered. If the premises are rendered unfit for *that purpose* by conduct of the lessor, the fact that possession may be retained nakedly or

for other purposes is of no moment. *Pridgen v. Excelsior Boat Club,* 66 Mich. 326, 33 N.W. 502.

The law is well summarized in *Silber v. Larkin et al.,* 94 Wis. 9, 68 N.W. 406 (1896):

> "The law governing the subject of this action may be briefly stated as follows: An actual expulsion from the leased premises is not necessary to constitute an eviction. Any act on the part of the landlord which so interferes with the tenant's possession of the leased premises as to unfit them for the purposes for which they were leased, and render them uninhabitable for such purposes, and compel the abandonment thereof, constitutes an eviction. *Leadbetter v. Roth,* 25 Ill. 587; *Hoevcler v. Fleming,* 91 Pa. St. 322; *Royce v. Guggenheim,* 106 Mass. 201; *Sherman v. Williams,* 113 Mass. 481. Such an eviction furnished ground for an action for such damages as are the natural and proximate consequences thereof."

From the facts that appellants' evidence reasonably tends to prove and the inferences fairly deducible from those facts, it would appear not open to doubt that appellants have made out a *prima facie* case of eviction in breach of the implied covenant of quiet enjoyment.

The premises were leased for a certain term for the purpose of mining. The entire benefit to be derived by the appellants from their possession of the leasehold was their share of the precious minerals recovered therefrom. After over six months of preparatory and exploratory work, appellants struck a rich pay streak. That the decedent lessor had knowledge

of this strike may be inferred from the fact that he visited the workings at least every other day and panned gold after commencement of the exploratory drift. Shortly after the pay was located and in the same month, the decedent lessor instituted suit against and procured the issuance and levy of a writ of attachment on the personal property of the appellants located on the claim. The complaint in that proceeding stated five causes of action, but one of which represents any alleged personal claim against the appellants—the other four representing obligations due and owing third persons which had been assigned to the lessor the day before the action was commenced. Appellants' evidence stands uncontradicted in this case that there was nothing due on the personal claim. For what purpose would the lessor, having knowledge of a discovery of a rich vein on the leased claim, fabricate a cause of action and purchase credits of third persons against his lessees? It is difficult to describe such conduct in a restrained manner, but, if anything, it certainly sustains the inference that the lessor intended to regain possession of the claim and to dispossess the lesses—and to that end employed an ostensibly legal procedure. His conduct would have commanded more respect had he recruited an army to rout his "newly-discovered" foe. Appellants then would have understood their position. But, apparently decedent was not inclined to employ the frontal attack—he chose rather the equally efficacious but "nicer" tactic of sweeping appellants out with a legal process they could hardly hope to comprehend.

There is still other evidence of the end intended by the decedent lessor and the attainment of that end. A custodian was placed in charge of the claim to see that the property attached was not lost, damaged, removed or destroyed. If it be suggested that decedent did not authorize this, one need only turn to appellants' Exhibit "H" (T.R. 174), a letter authorizing the Marshal to dispense with the services of "a keeper and watchman on the premises".

Could the appellants have continued to mine the claim after the attachment? Could they have continued to occupy and enjoy the claim for the very purpose for which it was leased? One need only examine what was attached under the writ to answer in the negative. Attached by the writ and in possession of the custodian were the appellants' cord wood, fuel oil, gasoline and grease; the dump consisting of pay dirt was removed by appellants from the mine and the contents of the sluice box—the product of appellants' labor. With no wood to heat the boilers, no fuel to operate their machinery, no food to eat and no sluice box through which to run their gravel, and no gravel to run through the sluice box—it must be apparent to anyone that appellants could not continue their mining operations. This was so serious an interference by the lessor with the lessees' enjoyment of the demised premises as to justify—to more than justify—to compel an abandonment of the claim; and the appellants promptly did just that. Thus a great victory against his foe was won by the decedent lessor.

Further proof of the decedent's object in commencing the action and procuring the attachment may be inferred in his voluntary nonsuit of the cause after the advent of cold weather had made unfeasible a resumption of mining operations. This also indicates that the end intended and the end obtained by the landlord was the permanent exclusion of the appellants from the claim.

In the light of the foregoing authorities and resume of evidence which was admitted, coupled with the inferential intent of the decedent deducible therefrom, there can be no doubt that appellants made out a *prima facie* case requiring that the evidence be submitted to the jury for their consideration.

As to whether or not appellants completed their *prima facie* case by showing a compliance on their part with the terms of the lease, if such proof were necessary, need not be considered as the Appellate Court must assume on appeal from a directed verdict that this element of the case has been proven, since a failure of evidence on this point was not specifically assigned by the trial Court to sustain its ruling in directing a verdict. (See Part IV of this brief.)

D.

Prejudicial evidentiary rulings.

A cursory examination of the transcript of evidence in this matter will reveal that counsel for appellants was met at every point in the development of his case by objections designed to obscure and be-

fog the issues rather than to elicit truth and to prevent prejudice. The profuse grounds of appellee's objections and the scarcity of reasons given for their sustainment cloud the record and make any objective analysis of what has been proven and what should have been proven a matter of great difficulty. If evidence is incompetent, irrelevant and immaterial, the better practice would be to require counsel to state with particularity the reasons therefor. And the same is true of any other objection. Cinematic attorneys and cinematic trials do not create standards for the bar to emulate. Absent telepathy, keen indeed must be the judicial mind which can, in the swift progress of a trial make infallible rulings from the source alone of its own knowledge unrefreshed by counsel's assistance. It is the function of counsel, as officers of the Court, to assist the judiciary in the attainment of truth.

Appellants will not endeavor to point out every error which occurred at the trial of the case, but will only seek to stress what are believed to be the more flagrant ones in the order that they occurred at the trial.

At page 59 of the transcript, after the appellant Nick Kupoff had testified that the decedent had visited the mine after August 8, 1942, the date when accounts were settled between the decedent and appellants, the following proceedings took place:

> "Q. And what would he do (the decedent) if anything?

A. He went down there one day panning.

Mr. Hurley. I object to that; incompetent, irrelevant and immaterial. What he did out there. I don't see any connection.

The Court. (to appellants' counsel) What is the relevancy, Mr. Taylor?

Mr. Taylor. Panned the gravel. Found it was rich. The relevancy would show that he had knowledge of this pay streak.

The Court. Well, I don't see that it is material at all. Objection sustained." (Parentheses inserts ours.)

It is submitted that the Court erred. The decedent's knowledge was certainly material as it would tend to show the intent and purpose of his commencing an action in the District Court. Having discovered that appellants had located a rich vein, it may be reasonably inferred that he commenced the action to regain possession, dispossess the appellants, and work it himself. If this were not his purpose, appellee was free to introduce evidence to negative that intent. The material facts in issue were the dispossession of the appellants and the decedent's intent to effectuate that dispossession. Under the circumstances, evidence of knowledge was certainly relevant as it tended to explain the acts of the decedent.

At pages 86, 87 and 88 of the Transcript, the following proceedings took place in the interrogation of the appellant, Nick Kupoff:

"Q. Now, calling your attention to Paragraph II of the fifth cause of action, in which it is

alleged that the partnership was indebted to the Northern Commercial Company in the sum of $387.99 on the 24th day of June, 1942, and $200.00 had been paid thereon, and there was a balance of $187.99 due the Northern Commercial Company on the 24th day of June?

A. Ya, that is right, from company.

Q. Now, also paragraph IV of the fifth cause of action alleges that the Northern Commercial Company, on the 21st day of August, 1944—or '42, assigned and transferred the said account to Mike Stepovich. Could you state whether or not such an assignment had ever been made?

Mr. Hurley. We object to that; incompetent, irrelevant and immaterial. No foundation laid; doesn't show this defendant knows what the Northern Commercial Company did in regard to their claims.

The Court. Objection sustained.

Q. Mr. Kupoff, since you left the Eastern Star claim and—have you ever received any bills from the Northern Commercial Company, asking for payment of that particular account?

Mr. Hurley. We object to that; incompetent, irrelevant and immaterial. Not within the issues of the case.

The Court. Objection sustained.

Mr. Taylor. Well, if the court please, we believe that is certainly competent. There is no showing that there was any assignment made of these various claims, your Honor.

The Court. They allege it, don't they?

Mr. Taylor. They allege it, but we want to show they were not made.

The Court. There is nothing to show this man has any knowledge of the matter at all. He isn't in a position to testify to it.

Q. Mr. Kupoff, did you know of the indebtedness of your partnership to the Northern Commercial Company?

A. Yes.

Mr. Hurley. Just a minute. I object to that; incompetent, irrelevant and immaterial. Not within the issues of the case.

The Court. Objection will be overruled. He said he still owed it.

Mr. Hurley. I understand, your Honor, but if the claim has been assigned by the Northern Commercial Company, he doesn't owe it.

The Court. What is your question, does he owe it to the Northern Commercial Company or does he owe the bill?

Mr. Taylor. This amount.

The Court. Then I will sustain the objection to the question.

Q. Mr. Kupoff, do you now owe the Northern Commercial Company a balance of $187.99, which was owed by the partnership on the 24th day of June, 1942?

Mr. Hurley. Just a minute, your Honor, I object again. It is the same thing.

The Court. Objection sustained."

The foregoing is illustrative of the difficulties that appellants met in the presentation of their case. Certainly, the appellant Kupoff should have been allowed to testify that the debt allegedly assigned by the Northern Commercial Company was still due and

owing. It is futile to argue that he couldn't testify to that fact because he had no personal knowledge of the matter for he was one of the debtors. Certainly, such fact was relevant to the issues raised by the pleadings. From such a fact, several inferences may be reasonably drawn: (1) That no assignment had ever been made; (2) That, if it had been made, there was a re-assignment made sometime after the decedent had accomplished the purpose of his suit; (3) That the assignment was not supported by a consideration, but was gratuitously made for the purpose of assisting the decedent to accomplish his object of evicting the appellants. In this connection, it should be recalled that the decedent entered a voluntary nonsuit which was admitted by the pleadings. Any of the above inferences would serve to qualify or explain that act which would further serve to make it relevant evidence in a legal sense. Above all other considerations, the fact sought to be shown and erroneously excluded, coupled with the circumstances of the nonsuit, would inescapably support the conclusion that the decedent's motive for commencing the suit in question was to accomplish that end which in fact was obtained—the ejection and exclusion of the appellants from the mining claims.

The proceedings which were had at pages 153 to 155 of the Transcript of Record deserve special attention. On direct examination of the appellant James Zukoev, counsel for appellants attempted to elicit from his witness information as to what the custodian had said with reference "to staying on the premises and

staying away from the sluice boxes". This question was met by appellee's attorney's usual objection of "incompetent, irrelevant and immaterial, not within the issues", and the startling innovation given as an additional reason that "anything that might have been said by the custodian is not binding on the Defendant." Previously, the appellant Nick Kupoff had testified (T.R. 83) that the attaching deputy had told the appellants to move. This was stricken (T.R. 84) for the express reason that there was no authority shown from "the Plaintiff in the case to do those actions." The propriety of these ruling will be questioned shortly. On cross-examination counsel for appellee obtained the following facts from the witness: That the appellants left the premises a couple of hours after the attaching deputy had arrived at the claim and that the appellants had returned to the claim three or four days later to procure their "beddings". The purpose of counsel's questions on this score was apparently directed towards negativing any suggestion to the jury from direct examination that the appellants' vacation of the claim had been something less than voluntary. In order to rebut and negate the matters brought out on cross-examination counsel for appellants asked the following question (T.R. 154): "When you went back three or four days after you were ordered off by Mr. O'Connor, who gave you permission to go back?" Counsel for appellee objected on the usual grounds: "Incompetent, irrelevant and immaterial, not within the issues of the case. * * *".

Attorney for appellants made the following offer to prove (T.R. 155): "We offer to prove by redirect examination on rebuttal examination that to go out there, these men had to secure permission from Mike Stepovich (the decedent) and they got a letter from Mike Stepovich to the custodian out there, allowing them to go out and get their blankets and stuff from the camp."

This offer to prove was erroneously rejected and appellee's objection sustained. We can discover no basis in law or reason for the trial Court's rejection of the proffered evidence. The law prescribing the proper scope of redirect examination is too well known to require citation of authority. An attorney, on redirect examination, may examine a witness as to any matter gone into on cross-examination or any inference reasonably deducible therefrom, and may also introduce through that witness any matters which tend to qualify or explain what opposing counsel brought out on cross-examination; subject, of course, to the further limitation, that the matters so inquired into do not fall within some rule of exclusion. Having stated the rule, it becomes immediately apparent that its application to the present situation would require the admission of the proffered evidence. It was certainly admissible evidence in that it tended to qualify or explain the visits of appellants to the claim after the attachment had been levied. Furthermore, it was relevant and material in a practical, legal sense in that it would show that decedent had knowledge of the exclusion of appellants and the appointment of

the custodian. From this it could be inferred that (1) he had either authorized and directed the ouster in the first place or (2), that, by his failure to remedy the matter after it had come to his attention, he had ratified the acts of the deputy and custodian and made them his own. (See *Maggio v. Price,* supra.)

Returning now to the Court's refusal to allow evidence that the deputy and custodian had directed the appellants to leave the claim, as above mentioned, apparently upon the ground that such evidence was inadmissible unless the prior authority to do these acts was shown (for the relevancy and materiality of the evidence cannot be sincerely questioned), it is submitted that the Court erred in such refusal. We frankly recognize that the trial Court has considerable discretion in determining what the order of proof shall be in a given case, but we do not believe that that discretion should be exercised in such a manner as to effectively deprive counsel of an opportunity to get his facts before a jury so that their function of fact-finding may be exercised. Proving any express authority by a deceased party directed to a marshal, a deputy or a custodian to do a particular act presents almost insurmountable obstacles in the field of evidence alone, not considering for a moment the practical difficulty of discovering evidence of direct authority.

In such a case, practice and experience dictates that we must determine from the circumstances alone whether that authority did or did not exist. At the

time Zukoev was asked whether the custodian had told him to leave the premises (T.R. 153), it had been established by appellants' evidence that the decedent had sued out a writ of attachment against appellants on several assignments and on a fabricated personal claim. In the levying of that attachment, the deputy acted in a dual capacity—as an officer of the Court and as an agent of the decedent. Aside from the fact that the decedent, as principal, would be responsible for the mode and manner of the execution of the writ within the scope of the deputy's authority, it may be inferred, from his manifest purpose in commencing the suit, that he had directed the deputy of the U. S. Marshal to exclude the appellants from the claim. This inference, coupled with the evidentiary presumption that a deputy acts within his authority and according to his instructions (31 *C.J.S.* (Evidence), Sec. 146, p. 826), it is submitted, lays a sufficient foundation for introducing evidence of an actual eviction by the attaching deputy and of remarks made by the custodian placed in charge by that deputy. Furthermore, when counsel for appellants sought to introduce evidence as to what the ordinary procedure of attaching personal property outside of town consisted of, he was prevented from so doing. (T.R. 174, 175.) Counsel for appellants was caught in the dilemma of being damned if he did and damned if he didn't.

VIII.

FAILURE OF EVIDENCE AS TO DAMAGE.

The fourth ground stated by the trial Court to sustain its direction of a verdict for appellee was a failure of evidence as to damages or, as pressed by the Court, "no specific showing as to any damage". On this particular point, the trial Court exhibited no parsimony of reasons to support its conclusions. Summarized, those reasons may be stated as follows: (1) That appellants failed to show the volume of gold-bearing gravel which they could have recovered, and the gold content thereof; (2) That appellants did not show the costs which would have been incurred in removing the gravel and reducing it to its gold content; (3) That no specific prayer was made to recover the $20,000.00 worth of gold alleged to be contained in the dump or unsluiced gravel which remained at the time appellants left the premises, and further, that there "was no proof there was any particular amount (gold, apparently) in the dump, or that the marshal or Stepovich (the decedent) had cleaned it up." (T.R. 273, 274.) (Parentheses inserts ours.)

The reasons advanced by the trial Court to sustain its rulings will be treated in this brief in the above stated order, together with a consideration of rulings at the trial of the cause which appellants deem erroneous and prejudicial.

A.

Failure to show volume of gravel and gold content thereof.

1. Value or gold content.

For the purpose of showing the volume of gold-bearing gravel remaining to be worked on the disputed claim and the estimated value thereof, attorney for appellants called as witness Joseph Ulmer, a qualified mining engineer of 45 years experience who had received an under-graduate degree in engineering from Polytechnic at Lins and a certificate of post graduate work from the School of Mines at San Francisco. Mr. Ulmer's qualifications are set out at pages 196 to 198 of the transcript of record and his entire testimony is encompassed in pages 198 to 219. We request that this Court read this testimony in its entirety, in order that it might fully appreciate the obstacles imposed to appellants' proof of a matter which is inherently difficult of proof even with some degree of judicial cooperation. Rules of evidence are not designed to impose inflexible standards of procedure on counsel. Their object is to aid in a judicial determination of truth and their development and refinement in the judicial process has been ever mindful of that end. In the application of those rules to particular questions, a trial Court is vested with considerable discretion—but that discretion should be exercised with a view towards the object and purpose of those rules.

After Mr. Ulmer had testified to visiting the leased premises named the Eastern Star Claim in the summer of 1942, he was asked by appellants' attorney to

tell the jury what exploration work he had found to have been done on the claim (T.R. 199)—"by Mr. Stepovich and the F. E. Company". (T.R. 200.) This was objected to and sustained, perhaps correctly so, upon the grounds that no prior evidence had been introduced that the F. E. Company or Mike Stepovich had done any exploratory work on the claim. (T.R. 200.) The order of proof is largely discretionary with the trial Court and we will not quarrel with a ruling that shows no patent abuse of that discretion. But counsel, having been informed of the errors of his ways, sought to amend his course accordingly and lay a foundation for his examination by asking his witness the following preliminary question:

> "Q. Mr. Ulmer, did you know if any other parties had made an exploratory examination of that property?"

This question was met like a broken record with opposing counsel's "incompetent, irrelevant and immaterial", which objection was sustained by the Court without reason given. Certainly, appellants' attorney was entitled to a minimum leeway in asking preliminary questions and in laying a foundation for an examination of his witness. If the question had no legal relevancy, it had none in the same sense that the question "what is your name?" possesses no legal relevancy inasmuch as an answer of "Richard Roe" or "John Doe" will, generally speaking, not affect the substantive rights of the parties. But the error committed here is a more serious one than a mere refusal to permit a preliminary question. The Court here,

has suggested to counsel the proper approach to be made in the examination of his witness and then, in the same breath, refuses to sanction that approach.

Not satisfied that his rebuke was permanent, counsel posed the following question:

> "Q. Mr. Ulmer, as a result of your examination of the surface of that claim, were there any indications of that claim having been drilled to ascertain its value?" (T.R. 201.)

As inevitable as light follows darkness came the objection of incompetency, irrelevancy and immateriality, but deeming the matter one to require elaboration, appellee's counsel added the following reasons: "Doesn't have anything to do with the issues of the case, who drilled the hole, or what the value was. This is a claim that might have been drilled. I don't know. But, that is—wouldn't be the best evidence." The trial Court sustained this objection. Whether it was sustained for one, all, or none of the grounds suggested by appellee's counsel, does not appear. For aught that appears, counsel for appellee was interposing an objection to a question he had dreamed up—not the one asked by appellants' attorney. Appellants' attorney did not ask "who drilled the hole", but whether there were indications that it had been drilled. The value of the claim was certainly relevant. Appellants were seeking damages for what they might have recovered from the claim had they been allowed to remain in peaceable possession. The objection that it wouldn't be the "best evidence" is equally absurd as appellants were offering nothing in evidence.

There being no other reason advanced by the trial Court to sustain its ruling, and there being none which we can think of which would sanction the ruling, it is submitted that the trial Court's ruling was error.

The next question appellants' attorney asked was whether the witness had any drill logs showing the result of drilling on that particular claim. Appellee's attorney objected on the grounds that drill logs wouldn't be competent unless they were the result of drill holes on the ground actually being mined. (T.R. 201.) The objection was sustained upon the grounds that the question had no relevancy as asked. Again, as seems to be true throughout the testimony of Mr. Ulmer, the objection was premature as was its sustainment. It was incumbent on appellants' attorney, in the regular order of proof, to ascertain first whether his witness had any drill logs showing the results of drilling on the claim, before he could be allowed to show where the holes had been drilled and what values they revealed. Thus were appellants effectively blocked on that line of inquiry.

Finding himself blocked in this approach, appellants' attorney then asked the witness: "Mr. Ulmer, did you ever have any conversation with Mike Stepovich during his lifetime, regarding the values in various holes adacent to, or on the workings that Mr. Zukoev and Mr. Kupoff were carrying on mining operations?" (T.R. 202.) The Court promptly blocked this attempt by counsel upon an objection of incompetency, irrelevancy, immateriality, remoteness, indefi-

niteness, not binding, that counsel did not limit where holes were and that what drill holes show are not definite. Let us treat counsel's objections in the order in which they are made.

Incompetent evidence is evidence which is unfit for the purpose for which it is offered. 31 *C.J.S.* (Evidence), Sec. 186, p. 906. Again, counsel has been premature in his objection. The question asked was a preliminary one laying a foundation for an inquiry as to values discovered on or adjacent to the ground being mined by the appellants. But, assuming for the purposes of argument that the objection is not premature, the question then posed is whether drill holes adjacent to or on the ground being mined are fit or competent evidence to show the value of the ground. Before answering that question, it is well to consider the practical difficulties met in proving the value of mining ground. There is, generally speaking, no consistency of gold content in gravel over any appreciable area. The best evidence of what the gravel contains would be to remove it from the bedrock and sluice it through the boxes. But this appellants were prevented from doing. Concededly, this is the only foolproof or infallible method of ascertaining the gold content of gravel. Examined from this viewpoint, the answer to this question hinges on the answer to a second question of whether it is the policy of the Courts to require such an exactitude and certainty of proof as to effectively deny relief in any case where anticipated recoveries from a mining claim constitute the damages which are sought? To ask the question is to an-

swer it. A rule of law that would require strict proof of value under the circumstances would operate to encourage mine owners to breach their lease when the exploratory work of the lessees had uncovered the pay streak.

If permitted to digress for a moment, if it were the opinion of the trial Court (and the trial Court states no reason for sustaining the objection) that the value of drill holes on or adjacent to the ground being mined by appellants was not competent evidence of value, then certainly the next question posed by appellants' counsel should have been permitted:

> "Q. Mr. Ulmer, what is the procedure to ascertain the value—that is, the procedure that a mining engineer follows to ascertain the values in a placer mining claim?" (T.R. 202.)

The obvious purpose of asking this question was to lay a foundation for a determination of what had been done particularly with respect to this claim to determine its value. And appellants' attorney so explained when queried as to its relevancy by the trial judge. (T.R. 203.)

> "Mr. Taylor. We want to show this ground was drilled; there was a definite value in there in the immediate vicinity where the men were working. We have to show the values in it. We can use any evidence we can possibly get, if we can show what was taken out before that by others mining on that ground. I just asked how he determines the value. It is not as to this particular claim, but as a general procedure a mining engineer goes through."

Immediately upon conclusion of counsel's reasons as stated, appellee's attorney made the following remark:

> "Mr. Hurley. But that can't be binding, your Honor. Drill holes don't always tell the truth."

Whereupon, with justification, appellants' counsel remarked:

> "We are not asking about drill holes. We are asking him to tell how they ascertain values—— (interrupted.)"

Interrupting counsel, the Court stated:

> "I will sustain the objection."

It is very likely that there was some degree of oppressive finality in the Court's interruption. No one, we feel, would have blamed the appellants' attorney if he had refused to carry the case further. Like Henley's "Invictus", his head must have been "bloody, but unbowed", for he continued his examination

Returning now to the other reasons advanced by appellee's counsel in his objection to appellants' question as to a conversation with Mike Stepovich (the decedent) relative to the values of drill holes adjacent to or on the workings of the appellants (T.R. 202), the next reason assigned was irrelevancy. Again the reason stated was premature as the question asked was whether there had been a conversation. But assuming again, for the purposes of argument, that the reason stated was timely, then the matters which were apparently to be inquired into certainly were relevant.

Relevancy is defined by 31 *C.J.S.*, Sec. 158 (Evidence), p. 864, as follows:

> "Logic is the controlling factor in the modern law of evidence. An offer by a party to prove a fact in evidence involves an assertion by him that such a relation exists between the fact offered and a fact in issue that the existence of the former renders probable or improbable the existence of the latter, and the relation thus asserted is termed 'relevancy'. It is therefore a basic rule of evidence that evidence of whatever facts are logically relevant to the issue is legally admissible except as it may be excluded by some specific rule or principle of law."

Certainly, there can be no question, by definition, of the relevancy of remarks made by the decedent with respect to the values of his claim. In issue were the damages that appellants sustained by not being allowed to recover their share of the mineral content of the land. Decedent was the lessor and owner of that claim. If anyone knew its value, he did. His remarks would tend directly to prove that value.

The next reason assigned by appellee's counsel in support of his objection was "immateriality". Materiality means simply that the fact which the relevant evidence tends to prove is material to the issues raised by the pleadings; that is, the fact is a necessary link in the chain of proof. 31 *C.J.S.* (Evidence), Sec. 158, p. 866. The fact which decedent's remarks would tend to prove was the value of the ground worked by appellants which fact was directly in issue.

Equally invalid and not deserving of the trial Court's consideration was the supporting reason of "remoteness". The question asked was a preliminary one. Yet, to be determined was the time at which the conversation took place, or the circumstances surrounding it. The same reasoning is applicable to the argument of "indefiniteness".

The next reasons assigned by appellee in support of his objection, "not binding, did not try to limit where this was, and it is not definite, anyway, as to what a drill hole might show" may be summarily disposed of. For a preliminary question "adjacent to and on the workings" of appellants is certainly definite enough; and if "drill holes" aren't competent evidence of values, then there is no way other than by mining to exhaustion to determine the gold content of a claim. Appellants are not certain as to what appellee's counsel meant by "not binding". If it is meant that the statements of the deceased lessor were inadmissible to bind his estate, then it is sufficient answer that appellants were not permitted to procure from their witness the circumstances surrounding that conversation.

There are other errors apparent of record in the testimony of Mr. Ulmer. The foregoing excerpts and discussion, however, serve to illustrate that appellants' attorney was blocked at every turn in his effort to show the value of the ground which remained to be mined. His was a difficult task in the absence of prejudicial rulings on the part of the Court and an impossible one in view of those rulings.

Within the possession and control of appellee is the information necessary to make a definite statement of what the ground contained. Appellants should have been permitted to present their case, and if the resultant estimate of damages was too high, appellee was free to introduce evidence tending to reduce or negative the estimated damages. The Court's attention is called to the case of *Isabella Gold Mining Co. v. Glenn,* 37 Colo. 165, 86 P. 349 (cited supra in section of brief dealing with substantive aspects of constructive eviction). Although the facts of that case are concededly different from the present case in that the evidence introduced by the evicted lessees to prove what they could have mined during the duration of their term was of the value of ore recovered by other lessees of the evicting lessor; still the attitude and reasoning of the Colorado Court are, it is submitted, applicable to the instant case.

Said the Colorado Court, pp. 350, 351:

> "For the purpose of proving that they could and would have mined, during their term, at least as much ore as defendant and its lessees on the Emma No. 1 wrongfully took from the Comet during such period of time, and as tending to show the amount of their damages, or at least one element thereof, plaintiffs produced evidence that, under defendant's order, its lessees on the adjoining Emma No. 1, mined and marketed ore from the premises demised to plaintiffs in value largely in excess of the amount of the verdict. There was not, in every respect, a detailed and exact showing as to the amount, or value, of what

came from the Comet and what, if any, from the Emma No. 1, or just what was mined from the former during the term of plaintiff's lease. Defendant says there was no evidence at all that any part of such ores came from the premises let to plaintiffs, and none, on which any satisfactory computation could be made, showing the amount taken during the term. In this claim defendant is mistaken, though the evidence be not so explicit as it might be. However, that may be, it is entirely clear that if there is any uncertainty, either as to the amount or value of the ores which plaintiffs would and could have mined and sold during the term of their lease, this ambiguity could easily have been removed by evidence which was wholly under the control, and within the power, of the defendant company to produce at the trial. In such a case as this, every reasonable intendment in support of a verdict for a plaintiff will be made. A case quite in point is Little Pittsburgh M. Co. v. Little Chief M. Co., supra. Without further discussion, this contention of the defendant may be disposed of by saying that the verdict of the jury is sustained by the evidence. But if the evidence were more indefinite than it is, we would not disturb the verdict because, in the circumstances of this case, the eviction being proved and the extraction of large bodies of ores by defendant and its other tenants being shown, the burden was upon defendant to prove the amount and value of the ores which it and its lessees removed during the term of the plaintiffs' lease, and it entirely failed to discharge that duty."

When appellee's decedent repossessed the claim in the instant case, that repossession operated as a conversion of appellants' interest in the leasehold—their interest in the gold in place—what might have been recovered had appellants been allowed the peaceable possession of the claim for the duration of the term. With the lessor and his successor in interest rested the more exact knowledge of the mineral content of the claim and, if they choose not to come forward with that information, they are the ones to suffer from their silence—not the appellants.

In our treatment of evidentiary rulings, we have cited but little authority and that from an encyclopediac source. It is felt that the questions involved are, basically, fundamental ones in the field of evidence—a cutting ring on which every infant attorney grinds his teeth. Case authority is of little assistance. The fundamental rules remain unchanged—their application varied. Considering the multitude of cases involving the application of each rule, searching for an analogous case is an exhaustive and almost prohibitive task—a search for the proverbial needle. We all know the rules and the question on appeal is ultimately one of whether those rules were properly applied towards the ends of justice or prejudicially perverted in their application—having in mind at all times the peculiar facts and circumstances of each case.

2. Volume of gravel.

Having been prevented from proving the value of the gravel, there would be little or no reason for appellants to show its volume. That showing its value was a condition precedent to determining its volume was the ruling of the trial Court.

At pages 216 and 217 of the Transcript of Record, the following proceedings were had:

> "Q. Mr. Ulmer, how many yards of gravel would be—or, no—how many square feet of bedrock would there be from the face of the drift—when you seen it, to the boundary line of the claim?"

At this point, attorney for appellee made his usual objections and appellants launched a general protest against his conduct, at which point, the following occurred:

> "The Court. No relevance unless there is testimony of the gold content of the gravel.
>
> Mr. Taylor. Sir?
>
> The Court. I say, there is no relevancy to showing the quantity of gravel without showing the values.
>
> Mr. Taylor. That is what we are trying to—going to want to show, your Honor. We have showed the value already, by Mr. Zukoev and Kupoff, and we are going to show the gravel by this mining man who is a mining man of years standing.
>
> The Court. All right, objection sustained."

As heretofore shown, counsel was prevented from showing the value of the gravel by the rulings of the

Court. Here the Court uses as a reason for rejecting evidence of the volume, the very failure which had been induced by its rulings.

As indicated in the protest of appellants' attorney above, there had already been some testimony as to value. Appellant Nick Kupoff had testified (T.R. 47) that the gravel at the end of the drift, where appellants opened a thirty-foot face, ran a dollar and a half a pan in some spots and appellant James Zukoev (T.R. 131) testified that some gravel from the pay streak ran from a dollar and a half up to two or three dollars a pan. Appellee could not have complained if the Court had considered that evidence of value, coupled with the testimony of Ulmer as to the extent of the gravel, if permitted, as sufficient to take the case to the jury, since it was within the power and control of appellee to introduce their evidence of the true value of the claim. Nor would it have been improper in view of the *Isabella* case, above cited, for the trial Court to indulge in the presumption that the gravel exposed in the face of the mine extended to its limits.

3. Failure to show costs.

Here again it would have been futile for appellants to have introduced evidence from which a jury might make a reasonable estimate of its costs in removing gold from gravel, the volume and value of which it was not permitted to prove. As a matter of fact, no evidence could be introduced on that score until the volume of gravel was shown. So, if the record is de-

void of evidence on that point, the failure may not be attributed to appellants or their counsel, but the responsibility rests with the trial Court.

B.

Failure of evidence with respect to dump and its contents.

1. No specific prayer to recover.

It was apparently the trial Court's opinion that since appellants had made no specific prayer to recover $20,000.00 worth of gold alleged by paragraph VIII of the Second Amended Complaint (T.R. 6) to be contained in a dump at the time of appellants' eviction, that appellants were precluded from proving themselves entitled to their share of the contents of the dump. This is error.

Appellants were entitled to a liberal construction of their complaint and prayer. Especially is this true where the trial Court must decide whether or not to divest the jury of their function as triers of fact. And, as heretofore pointed out in this brief, every intendment is to be resolved in favor of the party against whom a verdict is directed. With these principles in mind, it is submitted that the allegation of Paragraph VIII of the Second Amended Complaint, of the appropriation of the decedent of the dump containing $20,000.00 worth of gold is not inconsistent with the later allegation of the loss of $100,000.00 as appellants' share of what would have been recovered had appellants been permitted to remain in possession for the balance of their term. The prayer for relief asks damages in the amount of $106,791.29—the $6,-

791.29 representing expenditures by the appellants in the development of the property. Adopting a construction most favorable to the appellants, as we are required to do, it must be concluded that the $20,000.00 value of the dump was included in the prayer for $100,000.00 anticipated recovery. The contents of the dump as well as the gold in place are values which plaintiff would have recovered but for the wrongful eviction.

But even if the trial judge were correct in his holding that the prayer for relief did not encompass the amount of gold contained in the dump, still that would not justify a denial of relief. As a general rule, the prayer for relief forms no part of the complaint or petition and the allegations in the body of the complaint and the proof in support thereof fix the amount of recovery. *U. S. Fidelity & Guaranty Co. v. Nash,* 20 Wyo. 65, 124 P. 269, denying rehearing 20 Wyo. 65, 121 P. 541. Also, see authorities cited 41 *Am. Jur.,* Sec. 109 (Pleading) p. 3661. And the prayer has been held by the Alaskan District Court to form no part of the complaint. *Kline v. Flannigan,* 7 Alaska 577. Furthermore, Sec. 55-9-21 *A.C.L.A.* 1949, expressly limits the recovery permitted a plaintiff on failure of the defendant to answer to the amount stated in the summons or prayed for in the complaint. Inferentially, that section sanctions no such limitation where an answer has been filed.

It requires no citation of authority that a trial Court must, as a general rule, disregard any error or defect in the proceedings which do not affect the

substantial rights of the adverse party. That appellants were seeking recovery of the $20,000.00 alleged to be contained in the dump was apparent on the face of the pleadings. At no time during the proceedings did appellee's attorney evince any surprise at evidence introduced by the appellants with respect to the dump, nor did he manifest his surprise by asking for a continuance. Nor, did either of appellee's attorneys call this point to the Court's attention in their argument supporting their motion for a directed verdict. Yet, the Court chose to rest its ruling partially on that technicality.

2. No proof as to gold content of dump.

Apparently, on the grounds that it might be in error on its ruling with respect to appellants' prayer for relief, the trial Court held that there was no evidence as to the gold content of the dump. In this the Court erred.

At page 47 of the Transcript of Record, Nick Kupoff testified that appellants had exposed a 30-foot face at the end of the drift in the pay dirt; and that he was able to get as much as a dollar and a half a pan from some spots in that face. There were approximately 200 yards of gravel in the dump when appellants were evicted (T.R. 57) and that gravel had come from the rich pay streak. (T.R. 58.) Previously, Kupoff testified that there had been three cleanups of gravel taken from the exploratory drifts prior to striking pay dirt. Three to four hundred yards of dirt were run through the sluice boxes on

each of these occasions and the gold recovered was valued at $1,400.00, $1,600.00 and $1,265.00. (T.R. 57 and 58.)

James Zukoev testified that once in awhile there would be a good pan from the pay streak which ran from a "dollar and a half to two or three dollars", and that a pan of dirt was equivalent to a good, full mining shovel. (T.R. 131.)

It is submitted that the above testimony presented sufficient evidence to go to the jury on the question of the values contained in the dump. Admittedly, it is not the most precise or exact evidence of damages ever presented. But, having due regard for the circumstances and the inherent difficulties involved in proving values, it gave the jury sufficient facts from which to make a reasonable estimate of damages—although, perhaps, an inadequate estimate. A jury would be perfectly justified, for example, in making the following computation: The least that appellants had recovered from three prior cleanups was $1,265.00; and the gravel run through each one of those cleanups was as much as 400 yards; therefore, since the 200 yards of gravel remaining in the dump came from richer ground than that removed from exploratory drifting, the appellants would have recovered at least one-half of the amount of the gold removed on the least lucrative of the cleanups—that is to say, $632.50.

Nor would a verdict of the jury allowing for some upward adjustment of the amount determined in view of the richer gravel involved be erroneous. In this

respect, it should be considered that this jury sat in a mining country and, it is submitted, would know the volume of dirt contained in a "good mining shovel or gold pan".

The only requirement imposed by the law is that evidence of damages be not entirely speculative. Only a reasonable degree of certainty is required. As stated in *Paul v. Cragnas,* 23 Nev. 293, 59 P. 857, p. 862:

> "All that can be required in any case or upon any subject is that the evidence shall tend, with a fair degree of probability to establish a basis of relevant inference * * *."

3. No evidence that marshal or decedent had cleaned up dump.

For good measure, and as an additional reason for taking the case from the jury as far as the dump was concerned, the trial Court held that there was no evidence that the marshal or decedent had taken its values. It is rather difficult to understand the legal significance of this point if there was, in fact, a failure of evidence with respect to it. It is appellants' contention that the contents of that dump were part of the values which they would have recovered had they been allowed to remain in peaceable possession for the balance of the term. The act of eviction operated as a conversion of these values. It was in this sense that decedent appropriated the dump.

However, assuming appellants' view is wrong, was there a failure of evidence that the decedent converted the dump—that he sluiced it and took his values? In this connection it must be remembered

that appellants' evidence, as heretofore considered, tends to prove that decedent's considered scheme was to evict his lessees and capitalize on their labor.

The testimony of appellant James Zukoev (T.R. 155-159) reveals that he returned to the mine to get his bedding approximately three to four days after the eviction; and that the dump was gone—that the gravel had been washed. During that three to four day period, a custodian was in charge of the personal property attached on the claim—a custodian who was paid by the decedent to protect and preserve the property attached by the decedent. Certainly, a reasonable inference to be drawn from those circumstances is that the decedent had washed the gravel and converted its values to his own use.

C.

Conclusion to section on damages.

In conclusion, we wish to call this Court's attention to the fact that even if there had been a failure of evidence as to damages, still appellee was not entitled to a directed verdict, nor was it proper for the trial Court to direct a verdict where, as in the instant case, appellants have established a *prima facie* case entitling them to at least nominal damages. *(Puutis v. Roman,* 76 Mont. 105, 245 P. 523; 25 *C.J.S.* (Damages), Sec. 176, p. 859.)

And even if it is held that appellants' evidence in the instant case, is not sufficient to give the jury a basis upon which they can make a reasonable estimate

of damages, still they have proved an actual loss for which they are at least entitled to nominal damages. *(Call v. Coiner,* 43 Idaho 320, 251 P. 617.)

Dated, Fairbanks, Alaska,
May 15, 1950.

Respectfully submitted,
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